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IN THE

Supreme Court of the United States

October Term, 1951
No. 599.

LIONEL H. SANGER,

Petitioner,

vs.

THE PLOMB TOOL COMPANY, a corporation,

Respondent.

PETITIONER'S REPLY MEMORANDUM.

The Decision of the Court of Appeals Was Purely One of Law, Not Fact, and the Law Thereby Established Is Important in the Application of a Federal Statute to a Large Portion of the Population.

The decision of the Court of Appeals was not of a factual nature as contended by respondent (Resp. Br. p. 9) but was solely one of law. The District Court, after trial, found the facts in favor of the veteran. The Court of Appeals did not disagree with the trial court as to these facts but held that the veteran was not entitled to his judgment, purely as a matter of law.

Thus this Court, on certiorari, is not called upon to decide any disputed issue of fact.

There can be nothing unique or particular in this case about the relationship of the veteran (petitioner) and the principal source of his pre-war livelihood (respondent).

In 1940, there were 592,327 traveling salesmen and sales agents in the United States (See census statistics recited in Petition, p. 8).

Respondent has not disputed petitioner's position that the question here presented is of the utmost importance to the administration of the Universal Military Training and Service Act (Act of June 19, 1951, 82nd Congress, 1st Session, c. 144, Public Law 51, 50 U. S. C., Appendix 459).

This Court Has Never Ruled on the Applicability of the "Economic Reality" Test to Veterans' Re-employment Statutes.

Respondent correctly points out that the Courts of Appeal have unanimously ruled that an independent contractor has no veteran's re-employment rights. But that is not the problem here.

In the past, this Court has spelled out the differences between the term "independent contractor" and "employee," as used in the Social Security, Fair Labor Standards, and National Labor Relations Acts (Resp. Br. pp. 14-15).

However, the difference involved in the Selective Service and Universal Military Training and Service Acts lies between an "independent contractor" and "one who left a position in the employ of any employer."

The special perplexities presented by this latter term have never been passed on by this Court, despite the numerous occasions on which it has arisen in the administration of the Acts and in the Courts below.

Did Congress mean something different than "employee" when it used instead the term "one who left a position?" In this case the Court of Appeals vaguely

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adumbrated the problem but certainly did not answer it when it said [R. 246; 193 F. 2d 260, 264]:

> "We recognize that there are certain fringe relationships which do not fit into either the independent contractor category or that of a 'position in the employ of a private employer.' Were we here confronted with such a fringe situation, it might then be incumbent upon us to hold this veteran to be within the protective scope of the Act. Such is not the case here."

The Alternate Grounds of Decision Relied on by Respondent Were Not Decided by the Court of Appeals.

Although "respondent considered him to be a good salesman" (Resp. Br. p. 20), it urges this Court to deprive petitioner of his re-employment rights because:

1. He refused the particular post-war job offered by it (Resp. Br. pp. 19-20);[1]
2. He brought his action too late[2] (Resp. Br. pp. 21-22); and
3. The relief awarded him by the District Court was excessive (Resp. Br. p. 8, footnote 1).

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[1]The District Court chiefly based this part of its decision on the fact that the purported offer to petitioner was indefinite [R. 189-192] and not equal to the basis on which a stay-at-home salesman in the Pittsburgh area had been maintained by respondent after the war [R. 140].

[2]The problem of whether veterans' re-employment actions are to be governed by the conflicting limitation periods of the various states caused the Government to file an *amicus* brief on the petitioner's behalf when this case was before the Ninth Circuit. The question was also implicit in the recent case of *Wintuft Corp. v. Fuquea* (C. A. 5, 1951), 191 F. 2d 847, and there decided in the veteran's favor. This problem is one which the Court of Appeals should have the first opportunity to solve.

These issues were all decided in the petitioner's favor by the District Court and were left undisturbed by the Court of Appeals' decision [R. 243; 193 F. 2d 260, 263]. They are not ready for decision by this Court at least until decided by the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 599

LIONEL H. SANGER, PETITIONER

v.

THE PLOMB TOOL COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

Under the decision below, manufacturers' representatives and traveling salesmen working on a commission basis are denied the reemployment benefits granted by Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, as amended, 50 U.S.C. App. 308) to returning veterans who have left "a position, other than a temporary position, in the employ of any employer" to enter the armed forces of their country. They are denied these benefits not on the ground that the

declared policy and purposes of the Act will be effectuated by excluding this large group of veterans from the protection afforded by the Act but because of technical common-law distinctions between independent contractors and employees.

Although the court below purports to follow the principles established in recent decisions of this Court relating to employment relationships under remedial social legislation, it is apparent that it has misconceived the pronouncements of this Court. Thus, the court below states that "whether we are dealing with cases involving the responsibility of a person for the acts of those under his control or with remedial or regulatory statutes, the basic distinctions between an employee and an independent contractor are the same" (R. 244). And of these "basic distinctions," the court manifestly regarded the factor of degree of control as dispositive, declaring that "[respondent] looked to [petitioner] for a result, and in reaching it, [petitioner] was wholly free to exercise his own independent discretion. The facts of this case fail to reveal any of the supervision, control, and direction that attaches to the employer-employee relationship" (R. 245).

Under the opinion of the Court of Appeals, formulary, fine-spun distinctions, discountenanced by this Court, have been applied to withhold the rights guaranteed by the Selective Training and Service Act from a significant number of

veterans who, as a matter of economic reality, are entitled to protection. As the petition points out (Pet. p. 8), in 1940 there were 592,327 traveling salesmen and sales agents, 239,142 insurance agents and brokers, and 90,094 canvassers and solicitors in the United States. The jeopardy to which this large group is subjected by the rule announced in the opinion below warrants, we believe, further review by this Court.

Contrary to the approach taken below, this Court, in interpreting the term "employee" in analogous legislation, has rejected not only the reference of that question to local state law but also the application of "a sort of pervading general essence distilled from state law." *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 122. "It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. * * * Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law" (*Id.* at 125-126).

Further, this Court has pointed out that the determination of the relationship of employer-employee does not depend upon any single criteria such as the degree of control or on any "isolated factors but rather upon the circumstances of the

whole activity." *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 730. It is the "total situation" which is critical (*United States* v. *Silk,* 331 U.S. 704, 719); the test is one of "economic reality." *Bartels* v. *Birmingham,* 332 U.S. 126, 130.

Here, as in the legislation construed in those cases, the phrase "a position * * * in the employ of any employer" was not used by Congress as a word of art, "and its content in its context [is] a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.'" *United States* v. *Silk, supra,* at 713. The patent purpose of Section 8 of the Selective Training and Service Act was to protect veterans from being disadvantaged by their service to the Nation. *Trailmobile Co.* v. *Whirls,* 331 U.S. 40, 58. "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind." *Fishgold* v. *Sullivan Corp.,* 328 U.S. 275, 284. Accordingly, the Act "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Id.* at 285.

That purpose, we believe, is frustrated by the rule adopted below. Petitioner and others similarly situated cannot be characterized as distributors who undertake to market at their own risk the product of another. Whether they be termed man-

ufacturers' representatives, sales representatives, or traveling salesmen, they are, as a matter of economic reality, employees of, and dependent for their livelihood upon, those whose products they market. That their compensation is placed on a commission basis, rather than salary, does not alter the economic fact that the distribution function they perform is one in which the opportunity for profit or loss is primarily that of the employer. They play an integral role in the business of those whose products they sell and are no less deserving of the protection afforded by the Act than those who perform correlated functions in the process of distribution at the employer's place of business. "In the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels* v. *Birmingham, supra,* at 130. We submit, therefore, that "where all the conditions of the relation require protection, protection ought to be given" (*National Labor Relations Board* v. *Hearst Publications, supra,* at 129), and that persons like petitioner should be held to have a "position" "in the employ" of those for whom they worked, to which they are entitled to be restored.

PHILIP B. PERLMAN,
Solicitor General.

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